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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 98

EDWARD KOHN, DOING BUSINESS AS EDWARD KOHN COMPANY, PETITIONER

v.

JOSEPH H. FREEHILL, DIRECTOR OF PRICE STABILIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 29-32) is reported at 203 F. 2d 958.

JURISDICTION

The judgment of the Emergency Court of Appeals (R. 33) was entered on April 30, 1953. The petition for a writ of certiorari was filed on May 29, 1953. The jurisdiction of this Court is invoked

under Section 408(c) of the Defense Production Act of 1950, c. 932, 64 Stat. 798, 809, as amended by the Act of June 30, 1952, c. 530, Title I, § 113(b), 66 Stat. 296, 302, 303, 50 U. S. C. A. App. 2108(c).

QUESTION PRESENTED

Whether petitioner's protest of the General Ceiling Price Regulation of 1951 was filed within the time limitations of Section 407(a) of the Defense Production Act of 1950.

STATUTE INVOLVED

The pertinent sections of the Defense Production Act are set forth in material part in the Appendix, *infra,* pp. 12-13.

STATEMENT

By a complaint filed on June 10, 1952, amended on December 5, 1952, the Director of Price Stabilization brought an action against Edward Kohn, doing business as Edward Kohn Company, in the United States District Court for the Northern District of Illinois, to recover treble damages for alleged overcharges by Kohn on the sale of pork products between June 11, 1951, and September 30, 1951, in violation of the General Ceiling Price Regulation (G. C. P. R.) (R. 5).[1] On December

[1] On January 26, 1951, the Director of Price Stabilization issued the General Ceiling Price Regulation (16 F.R. 808; 811-17). The regulation became effective immediately and its general effect and purpose was to hold prices on a broad front by employing the "freeze" technique. Under the regulation, the highest price charged by a particular seller for each commodity during the period from December 19, 1950, to January 25, 1951, became his ceiling price for all subsequent sales of the commodity. The original applicability of the General Ceiling Price Regulation to petitioner's sales is unquestioned. As of October 1, 1951, petitioner's sales became subject to Ceiling Price Regulation 74 (16 F.R. 9759).

29, 1952, Kohn filed a protest with the respondent, pursuant to the provisions of § 407(a) of the Defense Production Act of 1950, (50 U. S. C. App., Supp. V, 2107(a), App. *infra* p. 12), in which he attacked the validity of the G. C. P. R. insofar as it related to the sale of pork cuts and pork products at wholesale. He further objected to the treble damage proceeding instituted and pending against him in the district court. (Pet. App. 23.)

The protest was dismissed as untimely, not having been filed within six months of the effective date of the G. C. P. R. and because no new grounds arose or were shown to have arisen subsequent to the effective date of the regulation within the meaning of § 407(a) of the Act. Insofar as the protest related to the enforcement proceeding pending in the district court, it was dismissed as being beyond the jurisdiction of the Director of Price Stabilization, as defined in § 407(a). (Pet. App. 25-26.)

On March 2, 1953, petitioner filed his complaint with the Emergency Court of Appeals (R. 1-7) in which he alleged that his protest had been filed within the time limits of § 407(a), by reason of certain 1951 and 1952 amendments to the Defense Production Act (§ 402(k) as amended, 50 U.S.C.A. App. 2102(k), App. *infra* pp. 12-13) which assertedly constituted "new grounds" for protest "arising after the effective date" of the G. C. P. R., and thus permitted a protest after six months. Petitioner further alleged that the commencement of the enforcement proceedings in the district court also constituted "new ground" for protest within

the meaning of § 407(a). He prayed that the Emergency Court of Appeals enter an order to the effect that the G. C. P. R. was nullified by reason of the July 31, 1951, amendment to the Defense Production Act, as amended, 50 U. S. C. App., Supp. V, 2102(k).

Respondent moved to dismiss the complaint. Upon consideration of the motion and with the benefit of written arguments submitted by both petitioner and respondent (R. 10-17; 20-27), the court below entered its judgment dismissing the complaint for the reason that the protest had not been filed within six months of the effective date of the G. C. P. R. It held that because the 1951 amendment had no application to regulations in effect at the time of its enactment and because the G. C. P. R. no longer controlled petitioner s prices at the time of the 1952 amendment, no new grounds existed upon which to base a protest. Neither, the court held, did the bringing of the enforcement suit against the petitioner constitute new grounds for protesting the regulation allegedly violated. (R. 31.)

ARGUMENT

The petition seeks review of a judgment of the Emergency Court of Appeals which dismissed as untimely a belated attack upon the 1951 General Ceiling Price Regulation issued under the Defense Production Act of 1950, c. 932, 64 Stat. 798, as amended, 50 U. S. C. App., Supp. V, 2061 *et seq.*[2]

[2] Title IV of the Defense Production Act and the authority conferred thereunder terminated as of April 30, 1953. § 121(b)

The decision below is clearly correct and no question of general or continuing importance is presented meriting further review by this Court.

1. In essence, the complaint filed in the court below (R. 1-7) and the present petition constitute an attack upon the validity of the G. C. P. R., which was issued and which became effective January 26, 1951 (16 F. R. 808, 811-812). The sole question decided by the court below and the only material question presented by the petition is whether the protest filed by petitioner with the respondent on December 29, 1952, was within the time limitations for filing the protest as prescribed by § 407(a) of the Act.

In material part, § 407(a) provides that "within six months after the effective date of any regulation * * * relating to price controls * * * or, in the case of new grounds arising after the effective date of any such regulation * * *, within six months after such new grounds arise, any person subject to any provision of such regulation * * * may * * * file a protest * * *." Petitioner does not suggest that his protest filed on December 29, 1952, was filed within six months of the effective date of the G. C. P. R. but instead alleges that the protest was timely by reason of "new grounds" which arose after the effective date of the regulation. In support of this contention he relies upon the amendment of July 31, 1951, to the Defense

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of the Act of June 30, 1952, c. 530, Title I, 66 Stat. 306, 50 U.S.C.A. App. 2166(a). For purposes of liquidation, agencies created under the Act may be continued for six months from the date of termination. 50 U.S.C. App., Supp. V, 2166(b)(3).

Production Act (the Herlong Amendment)[3] which added a new subsection (§ 402(k)) to the Act and which, petitioner urges, when considered with the 1952 Amendment of § 402(k), nullified the G. C. P. R. of January 26, 1951, and thus constituted a "new ground" upon which to base a protest.

The 1951 amendment provided in pertinent part:

> No rule, regulation, order or amendment thereto *shall hereafter be issued* under this title, which shall deny to sellers of materials at retail or wholesale their customary percentage margins over costs of the materials during the period May 24, 1950, to June 24, 1950 * * *" [emphasis supplied].

Clearly, the contention that this amendment had the effect of nullifying the G. C. P. R. is without merit. The argument flies in the face of the prospective language of the amendment which plainly applied only to such rules, regulations and orders as *"shall hereafter be issued"* and thus obviously did not affect those regulations, including the G. C. P. R., which were extant at the time of the amendment. But even if it be assumed that the amendment was a "new ground" upon which to base a protest, petitioner's protest was not filed until December 29, 1952, almost 17 months after the so-called "new ground" arose, and therefore was not within the extended time limitation prescribed by § 407(a).

Petitioner obviously recognizes the manifest in-

[3] Act of July 31, 1951, c. 275, Title I, § 104(h), 65 Stat. 131, 136.

firmity of his position and hence strained reliance is placed upon the amendment to § 402(k) which was enacted on June 30, 1952.[4] By the 1952 amendment, the percentage margin requirement of § 402(k) became applicable to *existing* rules, regulations or orders as well as to those thereafter to be issued. The net effect of this 1952 modification of § 402(k) was to vitiate any *existing* rule, regulation or order which, on the date of enactment, denied the 1950 percentage margin to wholesalers and retailers. This change, petitioner asserts, was a "new ground" upon which to found a protest. But the fallacy of this contention is apparent, for at the time of the 1952 amendment petitioner's sale prices were controlled not by the G. C. P. R. to which his protest was directed, but by Ceiling Price Regulation 74, issued on September 25, 1951, effective October 1, 1951 (16 F. R. 9759), which already conformed to the percentage margin requirement of § 402(k). Thus, there was no existing regulation applicable to petitioner at the time of the 1952 amendment and, in the light of the plain language employed by Congress, it is clear that the 1952 amendment to § 402(k) was not intended as a sanctuary for previous violators of the G. C. P. R., or that it was intended to condone past violations of a regulation which, during the time it was in effect, was in all respects valid though perhaps reflecting a narrower pricing base than that which was ultimately to prevail.

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[4] § 110 of the Act of June 30, 1952, c. 530, Title I, 66 Stat. 296, 299-300, as amended, 50 U.S.C.A. App. 2102(k).

Were there room for doubt as to the purpose and intended effect of both the 1951 and 1952 amendments, it would be effectively resolved by the legislative history.

Section 402(k) had its inception in a House amendment to the Senate Bill (S. 1717) to amend the Defense Production Act. The bill, as originally introduced and passed in the Senate, contained no provision with respect to percentage margins. The House amendment provided, subject to exceptions not here material, that no action should be taken under the Act which deprived a seller at retail or wholesale of his customary percentage margin over his cost of material during the 1950 base period. The bill was referred to a conference committee which modified the House amendment so as to make it "inapplicable to regulations issued prior to the date of enactment of this amendment." Conference Report No. 770, 82d Cong., 1st Sess. p. 25. See also *Safeway Stores* v. *Freehill,* 202 F. 2d 753 (Em. Ct. App.). The reason for the conference modification, which gave prospective operation to § 402(k), was brought out in the consideration of the 1952 amendments to the Act. The Senate Committee on Banking & Currency, to whom was referred the 1952 bill (S. 2594) to amend the Defense Production Act, stated in its report, with respect to Section 402(k):

> The so-called Herlong amendment, section 402(k) as originally passed, was inapplicable to regulations issued prior to its enactment. This limitation was included because otherwise

> the effect on ceiling price regulations issued prior to its effective date was not clear. * * *
>
> Its purpose [the 1952 Amendment] is to express the congressional intent that as soon as practicable, depending on the circumstances in each case, all distributors be given the markups required by the provisions of section 402(k). * * *. [S. Rep. No. 1599, 82d Cong., 2d Sess., p. 26.[5]]

Assuming the correctness of petitioner's contention (Pet. 12) that § 402(k), as amended in 1952, sets forth a method of ceiling price determination different from that provided by the G. C. P. R., the repugnancy between § 402(k) and the regulation to which he alludes arises only because of the erroneous assumption that 402(k), as amended, operated retroactively so as to nullify all price control proceedings arising under the G. C. P. R. The assumption is contrary to the express language of the amendment, and its legislative history, and, as pointed out above (pp. 2, 7), at the time of the 1952 amendment, petitioner's prices were controlled, not by the G. C. P. R., but by C. P. R. 74 which gave him the percentage markups afforded by § 402(k).

2. Equally unmeritorious is petitioner's contention that the filing of the enforcement proceedings

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[5] See also Conference Rep. No. 2352, 82d Cong., 2d Sess., p. 19. As considered by the Conference Committee, the House bill (H.R. 8210) allowed 60 days in which to bring existing regulations into conformity with the percentage margin requirement of 402(k); the conference substitute eliminated this provision and 402(k) became effective from the date of enactment, June 30, 1952. *Ibid.* p. 19.

in the district court constituted a "new ground" upon which to found a protest. An enforcement proceeding by its very nature neither adds to nor detracts from the provisions of a rule, regulation or order, and hence has no bearing upon its validity or invalidity. New grounds for protest under § 407(a) of the Act must themselves be grounds of objection sufficient to support the otherwise untimely protest, and clearly must be grounds which exist independently of any enforcement proceeding. *Safeway Stores* v. *Arnall,* 195 F. 2d 319 (Em. Ct. App.), certiorari denied, 343 U. S. 965; *Safeway Stores* v. *Freehill, supra.*

Here, again, even if one assumes the correctness of the suggestion, it is of no avail to petitioner for the enforcement suit was commenced June 10, 1952, and the protest was not filed until December 29, 1952, more than the six months thereafter.[6]

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[6] The petition seeks to raise anew questions which relate to the constitutionality of the protest procedure and the adequacy of the review in the Emergency Court of Appeals, as well as the constitutionality of the enforcement proceeding still pending in the district court. These questions were fully disposed of in *Yakus* v. *United States,* 321 U.S. 414, and *Lockerty* v. *Phillips,* 319 U.S. 182.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JULY 1953.

APPENDIX

Section 407(a) of the Defense Production Act of 1950 c. 932, Title IV, 64 Stat. 807, 50 U. S. C. App. 2107(a), insofar as pertinent, provides:

> At any time within six months after the effective date of any regulation or order relating to price controls under this title, or, in the case of new grounds arising after the effective date of any such regulation or order relating to price controls, within six months after such new grounds arise, any person subject to any provision of such regulation or order may, in accordance with regulations to be prescribed by the President, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * *

Section 402(k) of the Defense Production Act of 1950, § 104(h) of the Act of July 31, 1951, c. 275, Title I, 65 Stat. 131, 136, as amended by § 110 of the Act of June 30, 1952, c. 530, Title I, 66 Stat. 296, 299-300, (50 U. S. C. A. App. 2102(k)), insofar as pertinent, provides:

> No rule, regulation, order, or amendment thereto shall be issued or remain in effect under this title, which shall deny sellers of materials at retail or wholesale their customary percentage margins over costs of the materials or their customary charges during the period May 24, 1950, to June 24, 1950, or on such other nearest representative date determined under section 402 (c), as shown by their records during such period, except as to any one specific

item of a line of material sold by such sellers which is in short supply as evidenced by specific government action to encourage production of the item in question: * * *

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